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No. 92-1982

In The

Supreme Court of the United States

October Term, 1993

HILLCREST MEDICAL CENTER,

Petitioner,

v.

RONDA SCRIBNER,

Respondent.

On Petition For A Writ Of Certiorari
To The Court Of Appeals
Of The State Of Oklahoma

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE AMERICAN HOSPITAL ASSOCIATION AND THE OKLAHOMA HOSPITAL ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

FREDERICK PAGE DOBSON*
RONALD R. HUDSON
ELIZABETH J. DUNNING
HOLLOWAY, DOBSON, HUDSON & BACHMAN
211 N. Robinson Ave.
Suite 900
Oklahoma City, OK 73102
(405) 235-8593

Attorneys for Oklahoma Hospital Association

FREDRIC J. ENTIN
JAMES A. HENDERSON
MARGARET J. HARDY
American Hospital Association
840 N. Lakeshore Dr.
Chicago, IL 60611
(312) 280-6619

*Counsel of Record

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Pursuant to Rule 37.2 of the Rules of the Court, the American Hospital Association and the Oklahoma Hospital Association respectfully move this Court for leave to file the attached brief as *amici curiae* in support of petitioner. Petitioner has consented to the filing of this brief. This motion is made necessary by the refusal of respondent to grant consent.

The *amici*, major associations of hospitals in the United States and in Oklahoma, have a vital interest in the issue presented here: whether a hospital may be subjected to a multi-million dollar punitive damages award solely on the basis of the unintentional actions of its employees, even

where the hospital stands to gain nothing from those actions and where the punitive damages are grossly disproportionate to any actual or potential harm to the plaintiff. Enormous punitive exactions of this kind will force hospitals to increase greatly their expenditures on wasteful, liability-avoiding measures, driving up health care costs far out of proportion to any medical benefits.

This brief focuses on an issue that has not been, and probably will not be, discussed by the parties: the devastating effect that large punitive damages awards such as the one in this case are having on health care providers and on the cost and availability of health care. The brief also discusses why certiorari is warranted in this case in light of this Court's decision in *TXO Prod. Corp. v. Alliance Resources Corp.*, 61 U.S.L.W. 4766 (U.S. June 25, 1993), which was decided after the petition for certiorari was filed. Because of the importance of the issues presented here to the *amici* and their members, *amici* seek leave to file this brief to assist the Court in the resolution of this case.

Respectfully submitted,

FREDERICK PAGE DOBSON*
RONALD R. HUDSON
ELIZABETH J. DUNNING
HOLLOWAY, DOBSON, HUDSON & BACHMAN
211 N. Robinson Ave.
Suite 900
Oklahoma City, OK 73102
(405) 235-8593

FREDRIC J. ENTIN
JAMES A. HENDERSON
MARGARET J. HARDY
American Hospital Association
840 N. Lakeshore Dr.
Chicago, IL 60611
(312) 280-6619

Attorneys for Oklahoma Hospital Association

*Counsel of Record

July 16, 1993

TABLE OF CONTENTS

Page

INTEREST OF THE *AMICI CURIAE* 1

ARGUMENT 3

I. ABSENT MEANINGFUL LIMITATIONS, PUNITIVE EXACTIONS SUCH AS THE ONE IN THIS CASE WILL HAVE A DEVASTATING IMPACT ON THE HEALTH CARE INDUSTRY 3

II. THE $5 MILLION PUNISHMENT IN THIS CASE IS GROSSLY EXCESSIVE IN RELATION TO THE ACTUAL OR POTENTIAL HARM TO THE PLAINTIFF, TO ANY POTENTIAL GAIN TO THE HOSPITAL, AND TO THE REPREHENSIBILITY OF THE CONDUCT 7

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES

Atkins v. Lee, 603 So.2d 937 (Ala. 1992) 5

Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989) 3

College Hosp., Inc. v. Superior Court, 16 Cal. Rptr. 2d 833 (Cal. Ct. App.), review granted, 19 Cal. Rptr. 2d 493 (Cal. 1993) 5

Hospital Auth. of Gwinnett County v. Jones, 409 S.E.2d 501 (Ga. 1991), cert. denied, 112 S.Ct. 1175 (1992) 5

Schroeder v. Lester E. Cox Medical Ctr., Inc., 833 S.W.2d 411 (Mo. Ct. App. 1992) 5

TXO Prod. Corp. v. Alliance Resources Corp., 61 U.S.L.W. 4766 (U.S. June 25, 1993) ..... *passim*

MISCELLANEOUS

AMA, *The Impact of Product Liability on the Development of New Medical Technology* (1988) 4

Financial Hardship Ahead for Hospitals, HFMA Predicts, J. of Accountancy 156 (Dec. 1987) 5

Franklin & Mais, *Tort Law and Mass Immunization Programs* (1977) 4

Friedman, *Hospital Uncompensated Care: Crisis?* 262 J.A.M.A. 2975-77 (1989) 5

Freudenheim, *Rising Number of Hospitals Forced to Close*, N.Y. Times, June 23, 1988, at A17 5

HHS, *Report of the Task Force on Medical Liability and Malpractice* 5 (1987) 3, 4, 5

TABLE OF AUTHORITIES – Continued

Page

59 *Hospitals* 40 (March 16, 1985) 4

P. Huber, *Liability: The Legal Revolution and Its Consequences* 156 (1988) 4

Manuel, *Professional Liability: A No-Fault Solution,* 322 New Eng. J. of Medicine 627 (1990) 3

Rostow, Osterweis & Bulger, *Special Report: Medical Professional Liability and the Delivery of Obstetrical Care,* 321 New Eng. J. of Medicine 1057, 1058 (1989) 3

Sieradzki, *Throwing Out the Baby with the Bathwater: Reform in the System for Compensating Obstetric Accidents,* Yale L. & Pol'y Rev. 538 (1989) 3

U.S. Dep't of Justice, *An Update on the Liability Crisis: Tort Policy Working Group* 51 (1987) 4

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INTEREST OF THE *AMICI CURIAE*

The American Hospital Association ("AHA") is the primary national membership organization for hospitals in this country. It has approximately 5400 member hospitals and other health care organizations. The Oklahoma Hospital Association ("OHA") represents 127 hospitals in Oklahoma. The AHA and OHA share a common objective: to promote high-quality health care and health services for all through leadership and assistance to

hospitals in meeting the health care needs of their communities.

This case is of vital importance to hospitals, doctors, and other health care providers. At issue is whether a health care provider may be subjected to a multi-million dollar punitive exaction solely on the basis of the inadvertent, nonmalicious actions of its employees, even where the provider stands to gain nothing from those actions and where the punitive exaction is wildly out of proportion to any actual or potential harm to the plaintiff. Liability of this kind will force health care providers to increase drastically their expenditures on defensive, liability-avoiding measures, driving up health care costs far out of proportion to any benefits thereby derived.

Amici fully agree with the arguments presented in Hillcrest Medical Center's Petition for a Writ of Certiorari. They submit this brief to highlight the devastating effects that punitive damages awards such as the one in this case are having – and, absent clearer direction from this Court, will continue to have – on health care providers and the health care system. *Amici* also submit this brief to point out why the punitive damages in this case cannot survive this Court's recent decision in *TXO Prod. Corp. v. Alliance Resources Corp.*, 61 U.S.L.W. 4766 (U.S. June 25, 1993).

ARGUMENT

I. ABSENT MEANINGFUL LIMITATIONS, PUNITIVE EXACTIONS SUCH AS THE ONE IN THIS CASE WILL HAVE A DEVASTATING IMPACT ON THE HEALTH CARE INDUSTRY

The skyrocketing increase in both the frequency and size of punitive damages awards in recent years[1] has contributed to a crisis in the health care industry. The soaring cost of malpractice insurance resulting from the increase in tort claims has forced many doctors to quit their profession or drastically raise their fees, decreasing the availability of health care for the community.[2] At the same time, product liability suits have profoundly retarded the development of new life-saving medical technologies and drugs.[3]

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[1] See *TXO Prod. Corp. v. Alliance Resources Corp.*, 61 U.S.L.W. 4766, 4782 (U.S. June 25, 1993) (O'Connor, J., dissenting).

[2] See, *e.g.*, Manuel, *Professional Liability: A No-Fault Solution*, 322 New Eng. J. of Medicine 627, 628 (1990) (noting that one in eight obstetricians stopped performing deliveries and 40% of surgeons ceased accepting high-risk cases because of the risk of malpractice suits). See also Sieradzki, *Throwing Out the Baby with the Bathwater: Reform in the system for Compensating Obstetric Accidents*, Yale L. & Pol'y Rev. 538, 540-41 & n.13 (1989); Rostow, Osterweis & Bulger, *Special Report: Medical Professional Liability and the Delivery of Obstetrical Care*, 321 New Eng. J. of Medicine 1057, 1058 (1989); HHS, *Report of the Task Force on Medical Liability and Malpractice* 5 (1987).

[3] See *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part) ("The threat of such enormous [punitive damages] awards has a detrimental effect on the research and development of new products. Some manufacturers of prescription drugs, for example, have decided that it is better to avoid

Moreover, the threat of enormous damages awards forces hospitals and other providers to engage in costly and wasteful defensive practices – *i.e.*, performing medically unnecessary tests and procedures and eschewing innovative and valuable procedures for fear of incurring legal liability. See, *e.g.*, HHS, *Report of the Task Force on Medical Liability and Malpractice* 97 (1987) ("HHS Report") (estimating annual cost of "defensive medicine" at $10.6 billion); 59 *Hospitals* 40 (March 16, 1985) (placing cost of defensive medicine at between $15 billion and $40 billion annually). Hospitals in turn are forced either to pass the cost of such "defensive medicine" on to consumers or to curtail – or completely shut down – patient services. The rapid escalation in the size of punitive damages verdicts since the mid-1980s suggests that these costs today would be far greater.

Two factors make hospitals particularly vulnerable to the rising tide of huge punitive damages awards. First,

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uncertain liability than to introduce a new pill or vaccine into the market."); P. Huber, *Liability: The Legal Revolution and Its Consequences* 156 (1988) (noting that the threat of increased liability forced out half of the U.S. vaccine manufacturers from 1965 to 1985, and that by 1986 there was only one supplier of vaccines for polio, rubella, measles, mumps, and rabies); AMA, *The Impact of Product Liability on the Development of New Medical Technology* (1988); U.S. Dep't of Justice, *An Update on the Liability Crisis: Tort Policy Working Group* 51 (1987) (stating that an $8 million punitive damages award "could very well have jeopardized the viability of the entire polio vaccination program" had it not been reversed on appeal), Franklin & Mais, *Tort Law and Mass Immunization Programs* (1977) (discussing drug manufacturers' refusal to produce influenza vaccine until government agreed to assume risk of lawsuits resulting from injuries caused by vaccine).

hospitals engage in inherently risky activity. No amount of caution can ensure that every patient recovers or that mistakes are never made in diagnoses or treatment. Thus, hospitals have become the target for an increasing number of malpractice suits seeking punitive as well as compensatory damages. See, *e.g.*, *Atkins v. Lee*, 603 So.2d 937 (Ala. 1992) (upholding $6.875 million award of compensatory and punitive damages against hospital and doctor); *Hospital Auth. of Gwinnett County v. Jones*, 409 S.E.2d 501 (Ga. 1991) (affirming award of $5001 in compensatory damages and $1.3 million in punitive damages against hospital), cert. denied, 112 S.Ct. 1175 (1992).[4]

Second, the rising costs of services, which generally outstrip revenues, has placed many hospitals in dire financial condition.[5] Because they lack the profit margin

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[4] See also *College Hosp., Inc. v. Superior Court*, 16 Cal. Rptr. 2d 833 (Cal. Ct. App.) (holding that evidence of hospital administrator's failure to investigate allegations of negligence by doctor would justify punitive damages against hospital), review granted, 19 Cal. Rptr. 2d 493 (Cal. 1993); *Schroeder v. Lester E. Cox Medical Ctr., Inc.*, 833 S.W.2d 411 (Mo. Ct. App. 1992) (affirming award of $92,453 in compensatory damages and $400,000 in punitive damages against pharmacy); HHS Report 166 (malpractice claims against hospitals doubled between 1980 and 1985).

[5] See, *e.g.*, Friedman, *Hospital Uncompensated Care: Crisis?* 262 J.A.M.A. 2975-77 (1989) (large financial losses stemming from caring for uninsured, indigent, and Medicare and Medicaid patients have forced hospitals to lay off employees, shut down emergency or obstetric departments, or close entirely); *Financial Hardship ahead for Hospitals, HFMA Predicts*, J. of Accountancy 156 (Dec. 1987) (noting decrease in operating margins and increase in long-term debt and average age of plant); Freudenheim, *Rising Number of Hospitals Forced to Close*, N.Y.

of ordinary business enterprises, hospitals cannot absorb large punitive damages awards without reducing or eliminating vital health care services.

Thus, the $5 million punitive exaction in this case will inevitably take its toll on the hospital's ability to provide adequate remuneration for personnel, to renovate old buildings and purchase needed new equipment, and to maintain vital but costly services. In the end, then, the burdens of the enormous punishment imposed on Hillcrest for the negligence of its employees will be borne by the citizens it serves in the form of increased health care costs and reduced medical services.

Given this background, the importance of this case to health care providers is plain to see. At a time when, more than ever before, reforming our health care system and reducing costly and wasteful practices has become a national priority, huge liability judgments such as the one in this case are pressuring hospitals to *increase* the use of unnecessary defensive practices, therefore driving up the cost of health care without corresponding benefit to public health.

Absent further guidance from this Court as to the constitutional limitations on punitive damages, the number and amount of punitive exactions awards will continue to spiral upward, threatening the viability of health care providers – and thus the availability of health care – across the country. This Court therefore should

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Times, June 23, 1988, at A17, col. 1 (sharp increase in number of hospitals going out of business because of cut in Medicare payments; 48% of hospitals vulnerable to failure in five years).

grant certiorari in this case, or at least remand for further proceedings.

II. THE $5 MILLION PUNISHMENT IN THIS CASE IS GROSSLY EXCESSIVE IN RELATION TO THE ACTUAL OR POTENTIAL HARM TO THE PLAINTIFF, TO ANY POTENTIAL GAIN TO THE HOSPITAL, AND TO THE REPREHENSIBILITY OF THE CONDUCT

In *TXO*, this Court reiterated that the Due Process Clause imposes a substantive limit on the amount of punitive damages. 61 U.S.L.W. at 4769 (plurality opinion); *id.* at 4772-73 (Kennedy, J., concurring in part and concurring in the judgment); *id.* at 4776 (O'Connor, J., dissenting). Although the Court did not spell out in detail how to determine whether a particular punitive exaction is unconstitutionally excessive and was divided on the question whether the exaction in that case was excessive, the $5 million punishment imposed in this case is grossly excessive and therefore unconstitutional under each of the different approaches set forth in *TXO*. Hillcrest's punishment is not only wholly disproportionate to the amount of actual damage suffered by respondent Scribner, but also bears no reasonable relation to any potential harm to her or potential gain to Hillcrest. It is also clearly excessive in light of the relatively low degree of "reprehensibility" of the defendant's conduct.

In *TXO*, the Court upheld a $10 million punitive damages exaction on the ground that the defendant's conduct had been "malicous and fraudulent" rather than simply negligent; that the conduct was "part of a larger pattern of fraud, trickery and deceit," rather than simply

an isolated incident; and that the defendant's scheme, if successful, *would* have caused harm amounting to several million dollars. 61 U.S.L.W. at 4770-71 (plurality opinion) (emphasis added); *id.* at 4773 (Kennedy, J., concurring in part and concurring in the judgment) (stressing that *TXO* "was not a case of negligence, strict liability, or *respondeat superior*," and that the defendant's conduct was " 'not an isolated incident' " caused by " 'poorly supervised, low level employees' ") (citation omitted).

Under the Court's reasoning in *TXO*, the punitive damages in this case were clearly excessive. Hillcrest was severely punished for the unintentional errors of low level employees on the theory of *respondeat superior*. Those employees were, at most, reckless in failing to identify Scribner, while the hospital itself was, *at most*, negligent for failing to institute additional procedures that would supervise its employees more closely and therefore reduce the risk of an error on their part. Moreover, the misidentification of Scribner was an isolated incident; there was no evidence of even a single other instance of misidentification in the hospital's history.

Furthermore, in marked contrast to *TXO*, the conduct at issue here did not threaten any potential harm greater than the harm actually caused to Scribner. Scribner was mistakenly moved from her bed in preparation for an ultrasound. That movement allegedly caused her sutures to break (even though Scribner was scheduled to be ambulatory that day). There was no allegation, let alone any evidence, that this movement could have caused any

more serious injury to Scribner. The "potential harm" factor of *TXO* is thus completely absent from this case.[6]

Finally, unlike TXO, Hillcrest did not stand to profit from its employees' negligence. This distinction is significant. In *TXO*, the potential gain to the defendant had its fraudulent scheme succeeded was far greater than the actual loss to the plaintiff in defeating that scheme. A large punitive damages award therefore may have been proportionate to the scope of the defendant's conduct and appropriate to deter future misconduct of like sort: because TXO stood to gain several million dollars from its fraudulent scheme, a compensatory award of only $19,000 (for attorneys' fees) could reasonably be thought unlikely to deter the company from engaging in a similar scheme in the future.

Here, however, where the employees' conduct was inadvertent and the hospital obviously did not intend (and could not have expected) to profit from the mishap, the compensatory damages were more than sufficient to cause the hospital to take necessary steps to prevent unacceptable risks of future misidentifications. Certainly punitive damages of $5 million – 50 times greater than

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[6] Notably, Scribner was correctly identified before the ultrasound was performed. The only relevant conduct here, then, is the failure correctly to identify Scribner before she was moved from her bed. In any case, even if the ultrasound had been performed, that procedure – a routine, noninvasive examination – would not have caused any harm. Thus, as Hillcrest points out (Pet. 11 n.10), the conduct in this case was hardly in the same category as performing brain surgery on the wrong patient.

actual damages – are far in excess of any amount necessary to deter future misidentifications or to satisfy society's need for just retribution.

The punitive damages in this case thus do not serve the purposes of deterrence or retribution. In fact, it seems apparent that the amount was based entirely on the hospital's net worth and corporate status. Scribner's counsel repeatedly emphasized Hillcrest's supposed "wealth," making it the centerpiece of his closing argument. Tr. 685-91. That argument was highly prejudicial, urging the jury to impose a large punitive damages award solely because Hillcrest was a large corporation. (Indeed, counsel's argument in this case bore a striking similarity to the closing argument that troubled the Court in *TXO*. Compare Hillcrest Pet. 8-9 with 61 U.S.L.W. at 4780 (O'Connor, J., dissenting)).

Even if consideration of a defendant's worth is not constitutionally proscribed, the Court in *TXO* recognized that undue emphasis on wealth poses a grave risk of prejudice to the defendant. 61 U.S.L.W. at 4771 (plurality opinion); *Id.* at 4779-80 (O'Connor, J., dissenting). Given the utter lack of any other basis for the $5 million punishment in this case, the risk of prejudice was particularly acute.

Finally, the $5 million exaction in this case is not simply unfair to Hillcrest and far in excess of any amount necessary to punish and deter misconduct, but it will adversely affect the ability of Hillcrest (and other health care providers aware of the result in this case) to provide critical health care services in the future. If left in place, the punitive damages will pressure health care providers

to adopt costly and wasteful defensive practices that serve no valid medical purpose and are employed only to avoid enormous tort judgments. If there is any case in which a punitive damages award is unconstitutionally excessive, this is it.

CONCLUSION

For the reasons stated above, Hillcrest's petition for a writ of certiorari should be granted or the case should be remanded for further proceedings in light of *TXO*.

Respectfully submitted,

FREDERICK PAGE DOBSON*
RONALD R. HUDSON
ELIZABETH J. DUNNING
HOLLOWAY, DOBSON, HUDSON & BACHMAN
211 N. Robinson Ave.
Suite 900
Oklahoma City, OK 73102
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